IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
September 26, 2006 Session

STATE OF TENNESSEE v. TIMOTHY JOSEPH SIMPSON

Direct Appeal from the Criminal Court for Bradley County
No. M-04-670 R. Steven Bebb, Judge

No. E2005-02364-CCA-R3-CD - Filed January 19, 2007

The defendant, Timothy Joseph Simpson, was convicted by a Bradley County jury of aggravated sexual battery, a Class B felony. He was sentenced to nine years in the Tennessee Department of Correction. On appeal, he argues that the trial court was in error for: (1) failing to compel the state to provide him with the victim's videotaped statement to the Children's Advocacy Center; (2) allowing Dr. Devane to testify concerning the medical history reported by the victim; (3) failing to instruct the jury on certain lesser-included offenses; and (4) sentencing him to a term of nine years. Upon our review of the record and the parties' briefs, we affirm the judgment of trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which NORMA McGEE OGLE and ALAN E. GLENN, JJ., joined.

A. Wayne Carter, Assistant Public Defender, Cleveland, Tennessee, for the appellant, Timothy Joseph Simpson.

Paul G. Summers, Attorney General and Reporter; Blind Akrawi, Assistant Attorney General; Jerry N. Estes, District Attorney General; and Kristie Luffman, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

BACKGROUND

The defendant was indicted for rape of a child, and following a March 2005 jury trial he was convicted of aggravated sexual battery, a lesser-included offense. After a sentencing hearing, the defendant was sentenced to nine years in the Tennessee Department of Correction.

The evidence from trial reflects that the defendant and his family were good friends with the victim's family and the victim often spent time at the defendant's house. The defendant's wife

babysat the victim during the summer while the victim's parents were at work. On July 16, 2004, the victim was at the defendant's house watching a movie with her brother and the defendant's two step-daughters. The children were watching the movie in the girls' bedroom; the victim was sitting on the bottom bunk of the bunk-bed.

The defendant entered the room and laid down on the bed behind the victim. The defendant put his hand down the victim's shorts and into her underwear. The victim said that the defendant "put his hand in [her] private." The victim told one of the step-daughters what had happened, then went home and told her mother who took her to the doctor after consulting with a pastor. The victim was eleven years old at the time of the incident. Two staff members of the defendant's church, the defendant's father-in-law, and Detective Kevin Felton with the Cleveland Police Department all testified at trial regarding admissions made by the defendant that he had touched the victim's vaginal area or "fingered" the victim. Detective Felton noted that the defendant was bewildered when he was not arrested after making these admissions during the interview.

The defendant asserted that the touching was an accident – that he had fallen asleep and woke up with his hand on the victim's inner thigh. The defendant also asserted that the admissions he made to Detective Felton and the church staff members were admissions of an affair he had with the victim's mother. The defendant's wife also testified that she was under the impression that the defendant's admissions to the church staff members were in regard to his affair with the victim's mother. The defendant's two step-daughters testified that when the defendant laid down on the bed behind the victim, the victim grabbed the defendant's hand, put it around her stomach, and snuggled up next to the defendant.

ANALYSIS

The defendant argues four issues on appeal. He argues that the trial court erred in: (1) failing to compel the state to provide him with the victim's videotaped statement to the Children's Advocacy Center; (2) allowing Dr. Devane to testify concerning the medical history reported by the victim; (3) failing to instruct the jury on certain lesser-included offenses; and (4) sentencing him to a term of nine years. We will address each argument in turn.

I. Victim's Statement

The defendant first argues that the trial court erred in denying disclosure of a videotaped statement the victim gave to the Children's Advocacy Center. He alleges that the victim's recorded statement might have included exculpatory and impeachment material.

In Tennessee, all reports of child sexual abuse are confidential. *See* Tenn. Code Ann. § 37-1-612. In part, the statute provides as follows:

> (a) In order to protect the rights of the child and the child's parents or other persons responsible for the child's welfare, all records concerning reports of child sexual

> abuse, including files, reports, records, communications and working papers related to investigations or providing services; video tapes; reports made to the abuse registry and to local offices of the department; and all records generated as a result of such processes and reports, shall be confidential and exempt from other provisions of law, and shall not be disclosed, except as specifically authorized by title 37, chapter 5, part 5, the provisions of this part and part 4 of this chapter.

The statute, however, provides an exception for the following to whom disclosure is permitted:

> (1) A law enforcement agency investigating a report of known or suspected child sexual abuse;
>
> (2) The district attorney general of the judicial district in which the child resides or in which the alleged abuse occurred;
>
> (3) A grand jury, by subpoena, upon its determination that access to such records is necessary in the conduct of its official business;
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> (4) Any person engaged in bona fide research or audit purposes. . . .;
>
> (5) A court official, probation and parole officer, designated employee of the department of correction or board of probation and parole or other similarly situated individual charged with the responsibility of preparing information to be presented in any administrative or judicial proceeding. . . .;
>
> (6) An attorney or next friend who is authorized to act on behalf of the child, who is the subject of the records, for the purpose of recovering damages or other remedies authorized by law in a civil cause of action against the perpetrator or other person or persons who may be responsible for the actions of the perpetrator; and
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> (7) An attorney or next friend who is authorized to act on behalf of another child, who has been the victim of other abuse by the same perpetrator, for the purpose of recovering damages or other remedies authorized by law in a civil cause of action . . . .

In *State v. Gibson*, a case similar to the case at hand, the defendant sought access to the victim's Department of Human Services' records, arguing that the records may have contained exculpatory evidence – namely contradictory statements and past claims of abuse. 973 S.W.2d 231, 244 (Tenn. Crim. App. 1997). This court held that defendants in child sexual abuse cases are not among the exceptions to Tennessee Code Annotated section 37-1-612, and therefore, were not entitled to access the confidential records. *Id.* In denying the defendant access to the records, the *Gibson* court stated the following:

> [Tennessee Code Annotated section] 37-1-612 makes all reports of child sexual abuse confidential. Through enumerated exceptions, the statute provides access to the following (a) law enforcement officers investigating child sexual abuse, (b) the district attorney general, (c) grand jurors through power of a subpoena, (d) those engaged in genuine research and audits, (e) probation officers or the like charged with presenting information in judicial or administrative proceedings, and (f) those treating the child.
>
> Those accused of child sexual abuse are not among the exceptions to [Tennessee Code Annotated section] 37-1-612. Furthermore, [Tennessee Rule of Criminal Procedure] 16(a)(2) prohibits discovery and inspection of reports and other internal documents made by state agents in connection with the investigation and prosecution of the case. Tenn. R. Crim. P. 16(a)(2). *See also State v. Clabo*, 905 S.W.2d 197, 201 (Tenn. Crim. App.), *per. app. denied* (Tenn. 1995). As in *Clabo*, [the defendant] wanted access to the DHS records to establish inconsistencies in the victim's statements and to gain access to information to impeach the victim. The defendant is not entitled to the records. . . .

Id.; *see also State v. Kevin Hunter Biggs*, No. E2005-01402-CCA-R3-CD, 2006 WL 2457669, at *16 (Tenn. Crim. App., at Knoxville, Aug. 25, 2006); *James Allen Bowers v. State*, No. E2004-01734-CCA-R3-PC, 2005 WL 1021563, at *9-10 (Tenn. Crim. App., at Knoxville, May 2, 2005), *perm. app. denied* (Tenn. 2005).

The defendant argues that the *Gibson* decision is erroneous because his defense attorney is a "court official" pursuant to Tennessee Code Annotated section 37-1-612(c)(5); and therefore, he argues that his attorney should have been allowed to review the videotape for exculpatory and impeachment material. Upon review, we note that the *Gibson* decision is published and holds precedential value regarding this issue. To reiterate, the *Gibson* court held that the accused was not entitled to records protected under Tennessee Code Annotated section 37-1-612. As such, we see no clear rationale to ignore *Gibson* and re-interpret section 37-1-612 to allow the defendant access to these protected records via his or her attorney. To do so, would violate the policy behind the non-disclosure statute, which is to protect the privacy rights of victims of child abuse. Therefore, based on *Gibson*, we conclude that neither the defendant nor his attorney were entitled to review the videotape.

The defendant argues that the trial court should have conducted an *in camera* inspection of the videotape to determine whether exculpatory or impeachment material existed. We first note that the record indicates the trial court requested the victim's Department of Children's Services records to conduct an *in camera* inspection but includes no further mention of what the court found as to the contents of the records. The record does not indicate that the defendant ever requested an *in camera* inspection of the videotape made by the Children's Advocacy Center if that videotape was not part of the Children's Services records. Moreover, the defendant failed to preserve the record for our

review in that he did not ask the trial court to seal the requested information (the videotape) and have it made an exhibit on appeal.

It is the duty of the defendant to prepare a record which conveys a fair, accurate and complete account of what transpired in the trial court with respect to the issues which form the basis of his appeal. Tenn. R. App. P. 24(b); *State v. Bunch*, 646 S.W.2d 158, 160 (Tenn. 1983); *State v. Hopper*, 695 S.W.2d 530, 537 (Tenn. Crim. App. 1985), *perm. app. denied* (Tenn. 1985); *State v. Wallace*, 664 S.W.2d 301, 302 (Tenn. Crim. App. 1983), *perm. app. denied* (Tenn. 1983). When the record is incomplete, or does not contain the proceedings relevant to an issue, this court is precluded from considering the issue. *Hopper*, 695 S.W.2d at 537; *State v. Hoosier*, 631 S.W.2d 474, 476 (Tenn. Crim. App. 1982), *perm. app. denied* (Tenn. 1982).

In sum, the defendant is not entitled to relief on this issue.

II. Dr. Devane's Testimony

The defendant next challenges the trial court's allowing Dr. Devane to testify concerning the credibility of the history provided by the victim. The defendant alleges that during Dr. Devane's testimony, Dr. Devane was in essence allowed to testify that he found the victim to be credible, and thus invaded the province of the jury.

At trial, Dr. Devane testified that he saw the victim on July 19, 2004, in regard to her complaint "that she had been touched by a friend's step-dad in her vaginal area." Dr. Devane stated that he interviewed the victim to obtain an accurate history because regardless of the reason a patient seeks medical treatment, the credibility of the patient's history is important in establishing medical facts. Dr. Devane testified that "80 percent of what you accomplish in a medical exam is obtained from the history and so it's very important that it be credible to you so that you can more accurately do the physical part of the examination." Dr. Devane concluded that he found the victim's answers calmly placed and very specific and that her history was quite credible.

Dr. Devane's physical examination of the victim revealed slight redness to the vaginal area. He did not detect any bleeding or tearing at the vaginal opening. Dr. Devane said that the redness to the victim's vaginal area was consistent with her complaint but he could not rule out other causes of the slight redness.

The Tennessee Rules of Evidence provide that all "relevant evidence is admissible" unless excluded by other evidentiary rules or applicable authority. Tenn. R. Evid. 402. Of course, "[e]vidence which is not relevant is not admissible." *Id.* Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* at 401. However, even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* at 403.

As a general rule, statements, which constitute hearsay are inadmissible except as provided by the rules of evidence or other applicable law. Tenn. R. Evid. 802. However, statements made for the purpose of medical diagnosis and treatment are admissible as an exception to the hearsay rule under Tennessee Rules of Evidence 803(4). The exception provides:

> Statements made for purposes of medical diagnosis and treatment describing medical history; past or present symptoms, pain, or sensations; or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis and treatment.

Tenn. R. Evid. 803(4).

Dr. Devane testified that he obtained the medical history from the victim and based upon his physical examination of the victim he found the history provided by the victim credible. While the determination of a witness's credibility is for the jury, we do not read the record to indicate that Dr. Devane was in any way vouching for the victim's credibility, but only that he found the victim's complaint consistent with the findings of his examination.

Even assuming it was error for the trial court to allow this testimony, such error was harmless. Tenn. R. Crim. P. 52(a). The victim testified that the defendant put his hand in her "private." The defendant's father-in-law, two staff members of the defendant's church, and the detective who interviewed the defendant, each testified to admissions made by the defendant to "fingering" the victim or putting his hand in her vaginal area. As such, due to the overwhelming evidence of the defendant's guilt, any error was harmless. The defendant is not entitled to relief on this issue.

III. Lesser-Included Offense Instructions

The defendant argues that the trial court erred in failing to charge the jury on child abuse and Class B misdemeanor assault as lesser-included offenses of child rape. The defendant, however, is precluded from raising this issue on appeal because he failed to submit a written request for the court to charge the lesser included offenses. *See* Tenn. Code Ann. § 40-18-110.

In Tennessee, a written request for a jury instruction on lesser-included offenses is required in order to raise the issue as a ground for relief in a motion for a new trial or on appeal. *Id.* § 40-18-110(b), (c). In pertinent part, the statute reads:

> (a) When requested by a party in writing prior to the trial judge's instructions to the jury in a criminal case, the trial judge shall instruct the jury as to the law of each offense specifically identified in the request that is a lesser included offense of the offense charged in the indictment or presentment. However, the trial judge shall not instruct the jury as to any such offense unless the judge determines that the record

contains any evidence which reasonable minds could accept as to the lesser included offense. In making this determination, the trial judge shall view the evidence liberally in the light most favorable to the existence of the lesser included offense without making any judgment on the credibility of such evidence. The trial judge shall also determine whether the evidence, viewed in this light, is legally sufficient to support a conviction for the lesser included offense.

(b) In the absence of a written request from a party specifically identifying the particular lesser included offense or offenses on which a jury instruction is sought, the trial judge may charge the jury on any lesser included offense or offenses, but no party shall be entitled to any such charge.

(c) Notwithstanding any other provision of law to the contrary, when the defendant fails to request the instruction of a lesser included offense as required by this section, such instruction is waived. Absent a written request, the failure of a trial judge to instruct the jury on any lesser included offense may not be presented as a ground for relief either in a motion for a new trial or on appeal.

. . . .

Recently, in *State v. Page*, our supreme court upheld the statute and its requirements by announcing that a defendant who does not submit a written request for jury instructions on lesser-included offenses is precluded from raising the issue as error in a motion for new trial or on appeal. 184 S.W.3d 223, 229-30 (Tenn. 2006). In this case, the record does not reflect that the defendant filed a written request for a jury instruction on the lesser-included offenses of child abuse or Class B misdemeanor assault. While the defendant did make an oral request at trial for an instruction on aggravated assault and simple assault, he did not submit a written request. Therefore, the defendant has waived consideration of this issue unless we conclude plain error exists.

"Plain error review extends only to a clear, conspicuous, or obvious error which affects the substantial rights of the defendant." *State v. Gomez*, 163 S.W.3d 632, 645 (Tenn. 2005) (citation omitted). The criteria for finding plain error are difficult to satisfy. We will not recognize plain error unless the following five factors are established:

(a) the record . . . clearly establish[es] what occurred in the trial court;

(b) a clear and unequivocal rule of law [has] been breached;

(c) a substantial right of the accused [has] been adversely affected;

(d) the accused did not waive the issue for tactical reasons; and

(e) consideration of the error is "necessary to do substantial justice."

State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (quoting *State v. Adkisson*, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)). All five factors must be established, and consideration of all five factors is unnecessary if any one factor indicates that relief is not warranted. *Id.* at 283. The defendant has the burden of proving the existence of plain error. *See Gomez*, 163 S.W.3d at 646. In order for this court to find plain error, the error must be of such a great magnitude that it probably changed the outcome of the proceedings. *See Adkisson*, 899 S.W.2d at 642.

After our review, we conclude that the trial court's failure to give jury instructions on the lesser-included offenses of child abuse and Class A misdemeanor assault does not rise to plain error. While child abuse and misdemeanor assault are lesser-included offenses of child rape, this court's consideration of the issue is not necessary to do substantial justice because of the overwhelming evidence in the record of the defendant's guilt of aggravated sexual battery, the offense of which he was convicted. Aggravated sexual battery is unlawful sexual contact with a victim by the defendant or the defendant by a victim when the victim is less than thirteen years of age. Tenn. Code Ann. § 39-13-504(a)(4). "Sexual contact" is "the intentional touching of the victim's . . . intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's . . . intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification." *Id.* § 39-13-501(6).

At trial, the victim testified that the defendant put his hand in her underwear and "put his hand in [her] private." The defendant's father-in-law testified that the defendant confessed to him that he put his hand in the victim's vaginal area. The youth pastor of the defendant's church testified that the defendant told him, "I fingered her. . . . She crawled up into my lap and I put my hand down her shorts and I fingered her[.]" The office manager of the defendant's church testified that she was called to the youth pastor's office during his conversation with the defendant, and the defendant told her that he had already confessed to the detective and "he was so sorry, it was an accident and he needed help [and] needed forgiveness." Detective Felton interviewed the defendant during which the defendant admitted that he had stuck his finger into the victim's vaginal area and admitted that one of his fingers went into her vagina. Detective Felton stated that the defendant said "what the girl says I did I did. . . . I stuck my finger in her." Dr. Devane testified that his findings from his physical examination of the victim were consistent with her complaint of being touched in her vaginal area. Due to the wealth of evidence of the defendant's guilt of aggravated sexual battery, the trial court's failure to give instructions on the lesser-included offenses of child abuse and misdemeanor assault was harmless error. "[T]hat the error was harmless, in context, suggests that consideration of the issue is 'not necessary to do substantial justice' and, therefore, not plainly erroneous." *See State v. Jose Rodriguez and Eladio Caballero Sanchez*, No. M2005-00951-CCA-R3-CD, 2006 WL 2310666, at *14 (Tenn. Crim. App., at Nashville, Aug. 7, 2006) (citing *Adkisson*, 899 S.W.2d at 642). The defendant is not entitled to relief on this issue.

IV. Sentencing

The defendant lastly challenges the trial court's sentencing determination. Specifically, he argues that the trial court erred in applying an enhancement factor because such factor was not found

by the jury or admitted by the defendant in violation of *Blakely v. Washington*, 542 U.S. 296 (2004). He also argues that the trial court erred by not considering any mitigating factors.

Initially, we note that our supreme court determined in *State v. Gomez* that Tennessee's sentencing structure did not violate the Sixth Amendment right to jury trial as interpreted by *Blakely*. 163 S.W.3d at 658-662. Additionally, the defendant conceded at the sentencing hearing that violation of a position of private trust was an applicable enhancement factor. Therefore, the defendant's contention that his sentence was enhanced in violation of *Blakely* is without merit. In any event, a review of the record indicates that the trial court properly sentenced the defendant.

When an accused challenges the length and manner of service of a sentence, this court conducts a de novo review of the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d). This presumption of correctness is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). However, if the record shows that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). If our review reveals that the trial court complied with the purposes and procedures of the 1989 Sentencing Act and its findings are supported by the record, this court cannot disturb the sentence even if we would have preferred a different result. *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

In conducting our de novo review, this court must consider (a) the evidence adduced at trial and the sentencing hearing; (b) the pre-sentence report; (c) the principles of sentencing; (d) the arguments of counsel as to sentencing alternatives; (e) the nature and characteristics of the offense; (f) the enhancement and mitigating factors; and (g) the defendant's potential or lack of potential for rehabilitation or treatment. *Id.* §§ 40-35-103(5), -210(b).

As a Range I, standard offender convicted of a Class B felony, the defendant was subject to a sentence of eight to twelve years. Tenn. Code Ann. § 40-35-112(a)(2). At the time of sentencing, our sentencing scheme indicated that the presumptive sentence for a Class B felony was the minimum in the range if no enhancement or mitigating factors were present. *Id.* § 40-35-210(c).[1] Procedurally, the trial court starts with the minimum sentence, increasing the sentence within the range as appropriate based upon the existence of enhancement factors, and then, reducing the sentence within the range as appropriate based upon the existence of mitigating factors. *Id.* § 40-35-210(d), (e). The weight to be afforded an existing factor is left to the trial court's discretion

[1] Since the time of the defendant's sentencing, Tennessee's sentencing scheme has been modified. Such modifications include the renumbering of enhancement factors and indication that application of enhancement factors is advisory, not mandatory. *See* Tenn. Code Ann. §§ 40-35-114, -210.

so long as the court complies with the principles of the 1989 Sentencing Reform Act and its findings are adequately supported by the record. *Id.* § 40-35-210, Sentencing Commission Comments.

A review of the transcript of the sentencing hearing indicates that the trial court considered the sentencing principles and the relevant facts and circumstances. Therefore, we review its decision de novo with a presumption of correctness. In the present case, the trial court applied enhancement factor (16), the defendant abused a position of trust, to increase his sentence beyond the presumptive minimum of eight years to nine years. Application of this factor was appropriate because the record reflects that the defendant was in a relationship with the victim that promoted confidence, reliability, and faith. *See State v. Gutierrez*, 5 S.W.3d 641, 646 (Tenn. 1999). The defendant's wife testified at trial that her family was very close to the victim's family and she babysat the victim on a regular basis. The victim testified that there were times she was at the defendant's house when the defendant was the only adult present. At the sentencing hearing, the victim's father testified that his family was very close to the defendant's family and spent three or four hours together every day. He stated that the victim spent the night at the defendant's home very often. As mentioned earlier, the defendant conceded at the sentencing hearing that this enhancement factor was applicable. Based upon the record and applicable authorities, we conclude that the trial court correctly applied enhancement factor (16) in determining the defendant's sentence.

In regard to the trial court's failure to apply any mitigating factors, we note that the defendant failed to offer any legal argument in support of his contention. Moreover, the record indicates that the trial court reviewed the mitigating factors set out in the pre-sentence report as well as the factor specifically argued by the defendant at sentencing. These factors were that: the defendant's conduct did not cause or threaten serious bodily injury; the jury was looking for something lesser of which to convict the defendant because it did not impose a fine; and the defendant cooperated with authorities and sought counseling. The trial court found that the mitigating factors were not powerful enough to reduce the defendant's sentence back to the eight year minimum. We reiterate, the weight to be afforded the mitigating factors was left to the trial court's discretion, and we discern no abuse in that discretion. Accordingly, we affirm the sentencing decision of the trial court and the defendant is not entitled to relief on this issue.

CONCLUSION

Upon our thorough review, we affirm the judgment of the Bradley County Criminal Court.

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J.C. McLIN, JUDGE